

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Docket No MB 14-57 Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo For Consent To Transfer Control of Licenses and Authorizations

Comment of MFRConsulting

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I have made a preliminary, not yet comprehensive review of the fully redacted public version¹ of the Opposition to Petitions to Deny ("Petitioners") and Response to Comments ("Opposition"), submitted by Comcast Corporation and Time Warner Cable Inc. or TWC ("Applicants"). I have also noted accompanying remarks to this submission published by David Cohen, Executive Vice President and Chief Diversity Officer at Comcast, as well as reports of reactions by opponents of these transactions such as Netflix and Discovery Channel².

Summary of Observations and Conclusions

Review of the contents of the Opposition and other data-rich independent sources of the history and current business practices of Comcast with respect to its customers and third parties yields the following observations and conclusions.

¹ <http://apps.fcc.gov/ecfs/document/view?id=7522909787>

² <http://corporate.comcast.com/comcast-voices/comcast-files-opposition-and-response-comments>

² <http://corporate.comcast.com/comcast-voices/comcast-files-opposition-and-response-comments> on-time-warner-cable-transaction; <http://www.hollywoodreporter.com/news/comcast-accuses-time-warner-cable-735399>

1. The content of Comcast's Opposition and of accompanying public remarks, such as the use of the word "**extort**" in reference to the motivations of organizations such as the Discovery Channel, Netflix and the Writers' Guild of America West (WGAW) behind the arguments and evidence presented in the Petitions to Deny is unjustified;
2. The arguments and evidence reiterated and reinforced by Comcast in its Opposition in support of the alleged transaction-specific benefits that will be generated by approval of its Applications are not credible;
3. Comcast's financial strengths and the history of how it has chosen to allocate substantial discretionary resources at its disposal (for example its many billions of dollars of stock buybacks amounting to around \$17 billion over the period 2006-2013) demonstrate that it has been in a position for several years to improve the lamentable and widely criticized quality of its customer care and expand its network coverage, but has chosen not to, even though it is now claiming that it will, and by implication will only be able to do so if its Applications are approved;
4. Comcast and other major U.S. broadband operators are operating in an uncompetitive market. These operators including Comcast are trying to obfuscate the true situation in terms of the choices available to customers by arguing that wireless broadband is becoming an effective alternative to fixed broadband services and that DSL technology is an effective competitor to current cable modem-based broadband. Neither claim is valid under current and foreseeable conditions of the capabilities of the technologies involved and the bandwidth demands of existing and future video services that comprise the bulk of broadband traffic. It is nonsensical to assert that market forces (the "invisible hand") are therefore sufficient on their own to ensure that Comcast, and a combined Comcast/TWC, will not be able, and will face strong disincentives that dissuade it from operating successfully to abuse its power with respect to customers and third parties;
5. In addition to errors of commission, there are also substantial errors of omission in the Opposition and related documents and statements by Comcast. Nowhere in discussions of the role of regulation does Comcast accurately acknowledge the history of the Internet and the major enabling and enforcement roles of Government initiatives, or recognize that the foundations for the Internet - a platform on which it and many companies have been able to flourish - were built against opposition from the leading network operator of the time (pre-divestiture AT&T)³.
6. Comcast's argument that there will no competitive consequences or effects on customers from approval of the Applications since the geographic cable franchises of the Applicants do not materially overlap is ludicrous, for at least four reasons. This merger will inevitably have material consequences as

³ Comcast merely states for example, (p.16 of the Opposition) with respect to the status of the Internet, "Today, the Internet is wide open and faster than ever before – thanks in large part to thoughtful regulatory policies that removed barriers to competitive entry, reduced regulation, and allowed this vibrant marketplace to grow and flourish."

result of the: (a) Impact in increased buyer power of a combined Comcast/TWC in the acquisition of content and devices since the proposed combinations and swapping of franchises will produce an operator with more consolidated contiguous operations in major U.S. media markets than they are today (notably New York and Los Angeles), (b) Impact on the foreseeable expansion and competitive dynamics of Wi-Fi-based and Wi-Fi-centric mobile and nomadic communications which Comcast, TWC and other large cable operators are pursuing as an opportunity to achieve quasi-national coverage well beyond the geographical confines of any one cable operator's franchises⁴, and (c) Likelihood that if TWC is acquired by Comcast its customers will become subject to the set top box policies of Comcast instead of those of TWC. TWC has been somewhat more open than Comcast in its approach to the acceptance of devices that customers can acquire to connect to its networks and the content they can access on these devices⁵, and (d) Stimulation of further consolidation in the broadband and video markets in the U.S. that will reduce the already very limited choices available to consumers for broadband access services.

This last finding (the inevitable further consolidation in the broadband and video markets that will follow from approval of the Comcast/TWC merger) is illustrative of the disingenuous content of Comcast's Reply Comments. Comcast argues, *"The Commission has long recognized – and courts have affirmed – that the Commission's duty is to review only the proposed transaction before it based on actual record evidence. "Mere possibilities are not of decisive significance in competitive analysis." Accordingly, this Transaction must be considered on its own merits, not in connection with any other transaction."* This point is especially pertinent in light of the proposed acquisition of DirecTV by AT&T that was announced shortly after the announcement of the Comcast/TWC transaction.

The demand from Comcast that the Commission should ignore the AT&T/DirecTV and other possible major transactions in the markets in which it operates in its review of the consequences of the Comcast/TWC/Charter transaction is preposterous. After all, Comcast is basing its arguments in favor of the transaction on what it has done in the past and what will happen in the future if the transaction is approved. In effect Comcast is claiming that it is allowed to present the benefits allegedly delivered by its past and ongoing actions, including the impact of earlier transactions (notably NBCUniversal), as well as the allegedly transaction-specific benefits of what it will do in future in combination with TWC. But at the same time Comcast is admonishing the Commission that it is illegitimate in its deliberations to take account of much of opponents' evidence and findings about Comcast's past and

⁴ See for example <https://gigaom.com/2014/04/08/seeking-an-edge-with-regulators-comcast-dangles-the-idea-of-a-wi-fi-first-mobile-network/> - TWC's acquisition by Comcast would preclude its entering a partnership that might compete with a Comcast-driven "Wi-Fi First" service.

⁵ See for example <http://www.timewarnercable.com/en/about-us/press/fan-tv-coming-to-twc-subscribers-nationwide.html>

ongoing actions and behavior and the consequences of approving the transaction. In other words, one side in a case can call witnesses and present all and any evidence that it wishes to, but the other side is severely restricted in this respect, and challenges to the bulk of the evidence presented by the first side will be excluded from consideration.

Furthermore Comcast claims in its Opposition that its combination with TWC *"...will spur greater competition, investment, and innovation by other providers."* So Comcast is also specifically claiming that it can refer to the impact of its acquisition of TWC on other providers in these terms, but it is irrelevant to consider whether a Comcast/TWC merger might "spur consolidation among other providers".

The audacious and outrageous nature of Comcast's attempt to exclude substantial evidence of a major consequence of approval of its transaction with TWC and Charter is reinforced by the fact that AT&T itself in its public interest filing in the Commission's Docket 14-90 on its proposed acquisition of DirecTV explicitly refers to the Comcast/TWC transaction as follows (emphasis added), *"The combined AT&T and DIRECTV will be able to offer new and better service bundles, creating a stronger competitor to the cable bundle. **Cable has long been the dominant provider of broadband and video services in the United States, and if the Comcast/Time Warner Cable/Charter transactions are completed, that dominance will swell even further.** By uniting AT&T's wireline and wireless broadband infrastructure and DIRECTV's nationwide video service under common ownership, the combined company will be able to bundle broadband and video (as well as wireless) services in ways that it could not without the transaction. And it will do so in many areas where cable incumbents are currently the only bundled service providers."*⁶

Comcast would prefer that the Commission close its eyes to what is going on around it, of which everybody else is fully aware. According to Comcast the Commission should review its Applications as if they were disconnected from the real world of consumers' experiences and the motivations and actions of any other companies as well as other highly visible factors that are influencing the dynamics of the markets in which it is operating.

Comcast's Strategy of Obfuscation and Misdirection

Comcast's strategy to secure approval of the Applications from the Commission by discrediting the Petitioners can be discerned from the content and language of the Opposition. This strategy is transparent in a passage found on page 17 of the Opposition that refers to and characterizes the demands and conditions expressed by the Petitioners (emphasis added):

*"The significance of this **extortion** lies in not just the sheer audacity of some of the demands, but also the fact that each of the entities making the "ask" has all but*

⁶ <http://apps.fcc.gov/ecfs/document/view?id=7521303307> (p.4)

conceded that if its individual business interests are met, then it has no concern whatsoever about the state of the industry, supposed market power going forward, or harm to consumers, competitors, or new entrants. The Commission should take heed of this, because, while the Transaction is perceived as an opportunity for so many to leverage their individual interests, none has been able to make a fact-based, compelling argument that the Transaction would actually harm the public interest.”

Comcast is striving to present the debate about the Applications as one that only involves disputes between commercial entities, all of which are seeking to maximize their strengths in reaching commercial agreements with Comcast. This scenario is designed to divert attention from the real battle that is underway.

This battle is not mainly, let alone exclusively, about the adjudication of conflicting demands by competing commercial entities for allegedly favorable and unjustifiable asymmetric treatment. **The battle is fundamentally about policy with respect to the goals traditionally associated with broadband in fostering opportunities and supporting innovation for the benefit of all Americans as well as all businesses and institutions from the smallest to the largest.** The Commission and other Government agencies have the responsibility of deciding whether the consequences if the Applications are approved will be tantamount to abandoning traditional policy embedded in current Laws, such as support for comparable conditions of access to network services throughout the country and for all Americans, and encouragement of small and rural carriers, even though there has been no legislation enacted to effect such a change.

The outcome of this battle will determine whether control over and key decisions about broadband networks, a vital part of the infrastructure of a 21st century economy and society that is necessarily dependent on the exploitation of scarce public resources, will rest predominantly in the hands of a small number of huge corporations, i.e., in practice a small coterie of their executives. Alternatively the directions chosen and priorities established for broadband infrastructure can reflect a richer and more balanced set of incentives than the narrow ones motivating these executives, including attention to the legitimate interests of all of us as citizens and consumers, as well as economic and social actors on behalf of other companies and institutions.

In the context presented by Comcast as illustrated above no public interest is involved, and therefore the Commission has no legitimate reason to intervene against or to materially alter the Applications. According to Comcast the Commission should stand back and let all the players involved establish “commercially reasonable” arrangements between themselves that thanks to the invisible hand in a competitive market will allegedly all work out to the benefit of customers and allow the forces of innovation to work their magic. However, there

are two problems with this Panglossian⁷ or excessively optimistic view of how the world works and companies operate.

First Comcast makes use of and depends on public resources to operate its networks, to which it has been awarded privileged access, whereas many companies with which it negotiates (e.g. device vendors, content and services suppliers) are not so dependent, and operate in intensely competitive markets unlike that for broadband access services. The exploitation of public resources should be for the benefit of all, not simply for the segments of the population that can provide the most commercially profitable customers. In this perspective Comcast has obligations to serve the public interest that are distinct from those of many commercial entities with whom it interacts. These obligations should be considered with regard to whether or not they are being upheld, neglected or even violated in the terms and conditions of agreements struck between Comcast and other commercial entities.

Second while it is true that the parties in many commercial negotiations are in positions of asymmetric power or influence nevertheless if a market is to operate in a genuinely competitive mode it is essential to ensure that the asymmetry of power does not become so large that in effect the weaker party has no choice but to accept whatever terms and conditions may be imposed by the stronger party.

The Petitioners to Deny should acknowledge that they are trying, as they are entitled, to make sure that they receive commercially reasonable terms including prices for the fruits of their labors, that are highly valued by Comcast's customers. Comcast is equally entitled to receive fair treatment from its suppliers. However there is substantial evidence from consumers demonstrating that Comcast has a widely recognized reputation for and persistently seeks to obtain commercially unreasonable prices – thanks to its power in an uncompetitive market - from its (and the Petitioners') customers, while failing miserably to provide them with the customer care and service they have every right to expect. Comcast's unreasonable prices cover the equipment it provides as well as services. Information and analyses (financial and other) of Comcast's business practices demonstrate abuses of power by this company that raise serious concerns about the risks and likely harm that will ensue if it is allowed to accumulate even more power with respect to customers and suppliers of content, services, and applications as well as devices to consumers.

The outcome of the goal of the Petitioners (and other opponents of Comcast's latest proposed transactions) is legitimate, desirable, and imperative. It involves more than a self-serving attempt to extract better terms from Comcast, although it includes the aim for the Petitioners of securing help to resist terms from Comcast that they consider as unreasonable. The outcome should be to ensure that the

⁷ From the fictional character Pangloss in Voltaire's novel *Candide*, whose philosophy was that all was for the best in the best of all possible worlds. Based on his experiences *Candide* eventually rejected this philosophy in favor of a more practical precept, without rejecting optimism outright.

Petitioners and others are able to negotiate commercially reasonable agreements with Comcast that are fair, and reflect the effects of genuinely competitive forces for the benefit of customers, and not exclusively Comcast, or potentially collusive arrangements between Comcast and selected third parties.

In order to sustain a fair and competitive environment it is necessary to avoid situations in which grossly unbalanced, or asymmetric negotiations take place with on one side an effective monopsony (Comcast), whose power is derived from its "choke point" control over customers, of which there are four, while on the other side are providers of content, applications and services as well as devices who are inevitably and critically dependent on access to the scarce resources (access channels to customers) that the monopsony controls.

In other words the Petitioners' goal and the purpose of their interventions of seeking to achieve a more favorable negotiating position with respect to Comcast (or avoid an unreasonably unfavorable or weak one) are congruent with and fully supportive of the public and of consumers' interests. These interests lie in preventing the emergence of a market environment in which **any** supplier (whether Discovery, Netflix, Comcast, AT&T, Verizon, Google or any other) of a good or service which consumers depend on or would like to acquire can command excessive prices that are unreasonably burdensome for customers, and accumulate so much power that it can dictate terms and conditions to third parties as well as to consumers and unilaterally block or inhibit the commercialization of innovations that may threaten its sources of revenue.

Questions for the Commission to Address

In evaluating and judging the credibility of the claims and assertions propagated by Comcast and its allies, as well as of the conflicting objections to and concerns about these Applications, the Commission should address the following questions:

- What message will be sent to consumers and to Comcast's competitors and potential partners if after the extensive and lengthy record of evidence from myriad individual experiences and surveys exposing Comcast's unacceptable and disgraceful record of customer care and service it is nevertheless rewarded or allowed to become larger and more powerful, even if it makes noises about its commitment to improvements in this domain, without having to provide any *ex ante* proof (as the saying goes, "fool me once, shame on you, fool me twice (or more) shame on me")?
- How many of the expressions of support for the Applications come from entities or individuals that have the technical, market and business expertise to independently evaluate Comcast's claims and have not received financial or other incentives from Comcast to dispose them favorably towards the Applicants, so they should be accepted as credible testimonies to the merits of the Applications?

- If these Applications are approved, following the approval of the acquisition of NBCUniversal by Comcast in 2011, is there any future consolidation (horizontal and/or vertical) between entities in the T-I-E sector (such as the pending AT&T/DirecTV) transaction that can be credibly opposed on public interest grounds?
- Comcast states that its opponents have provided no evidence to support their claims of harm to the public interest and consumers while it has provided ample evidence of the transaction-specific benefits that will be generated by its proposed transactions and solid reasons to support its case. There are tests the Commission should apply to investigate the respective validity and credibility of the opposing findings of the Applicants and the Petitioners, for example:
 - Comcast's campaign in favor of the Applications is built on the basis of its characterization of the markets in which it operates as effectively competitive, which relies on the findings among others that wireless broadband is an increasingly significant reasonable alternative to fixed broadband services, and DSL is still a substantial competitor to cable modem service as well as Comcast's denial that it has power over several "choke points" of access to its customers. How credible are these findings and this denial?
 - How credible is the evidence presented that Comcast has allegedly persistently abused its market power in its current business configuration through shoddy treatment of consumers and its efforts to control the conditions of access by its customers to selected services on the devices they would like to use, and of access to its customers by selected providers of services and applications⁸?
- Is the increasing concentration and accumulation of power in the broadband market in the hands of three companies (Comcast, Verizon, and AT&T), in which approval of the Comcast/TWC/Charter/SpinCo transactions would be another significant step, reaching a dangerous tipping point? In this environment the ability of smaller and new players including as yet unanticipated innovators (such as small and rural fixed and wireless operators and new providers of services, applications and devices) will be unreasonably inhibited from competing independently, and will be obliged to negotiate agreements with the major broadband operators on which their businesses depend with no ability to influence the terms and conditions imposed on them.

⁸ Comcast also claims in justification of its acquisition of TWC that partnerships and forms of collaboration other than outright acquisition are not effective in producing benefits. This statement is at odds with the roles and achievements of CableLabs and the CableTelevision Advertising Bureau.

The Choice Between Two Irreconcilable Scenarios

The two articles included with this filing (“The Top Ten Myths Major Broadband Providers Use Against Net Neutrality” and “Why the Comcast - Time Warner Cable Merger Will Fail”) delineate the breadth and extent of the disingenuous claims and assertions of Comcast - and where they agree of the two other major U.S. broadband operators – in their efforts to convince the Commission and all of us that their investments in broadband are being undertaken and their business practices are designed to and will achieve the best possible outcomes for customers and the public interest. Hence they argue that they should be given essentially untrammelled discretion in how they choose to use their (and public) resources and operate as for profit enterprises. Furthermore they assert that we should all take comfort in and welcome their assurances that in the scenario they propose the outcomes of their choices will generate greater value and benefits for our economy and society than the outcomes of any alternative regulatory regimes.

In its filings Comcast describes a rich portfolio of all the wonderful things it asserts it is doing that benefit consumers, MVPDs (Multichannel Video Programming Distributors), equipment manufacturers and others. Comcast also emphasizes that it is in no position to dictate to or impose any unreasonable terms and conditions or anti-competitive restrictions against the wishes of anybody else thanks to the forces of competition. In Comcast’s market scenario all players and interests (from consumers to third party services providers, other network operators, and device vendors) enjoy ample opportunities and the freedom to choose to “take it or leave it” as far as Comcast is concerned. However, this picture is unrecognizable in the experiences reported by consumers and third parties about their relationships with Comcast. Both cannot be right. One cannot be “tweaked” to make it even remotely similar to the other.

In other words the Commission is being asked to decide between two irreconcilable views of Comcast and the dynamics of the markets in which it operates, and then on that basis assess the public interest consequences of approving the transactions between Comcast, TWC, and Charter. If the Petitioners and others (e.g. many customers of Comcast) are correct, a few conditions imposed on or assurances by Comcast that it will act in the public interest and the interests of consumers once it has acquired TWC will make no difference. They will have no material effect on the allegedly harmful and widespread embedded behavioral patterns and activities of Comcast described by the opponents of the Applications. While if Comcast is correct there is no need for any conditions or assurances, because Comcast is already the best possible company of its kind in highly competitive markets.

More extensive assessments of the respective validities of these conflicting and mutually inconsistent scenarios will be forthcoming after further analysis of the Opposition including the accompanying Declarations.